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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ORACLE USA, INC., a Colorado corporation;  
 ORACLE AMERICA, INC., a Delaware  
 corporation; and ORACLE INTERNATIONAL  
 CORPORATION, a California corporation,

Plaintiffs,

v.

RIMINI STREET, INC., a Nevada corporation;  
 AND SETH RAVIN, an individual,

Defendants.

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Case No. 2:10-cv-0106-LRH-PAL

**ORACLE'S MOTION TO EXCLUDE  
 UNTIMELY EXPERT OPINIONS OF  
 SCOTT D. HAMPTON**

PUBLIC REDACTED VERSION

1 Plaintiffs Oracle USA, Inc., Oracle America, Inc., and Oracle International Corporation  
 2 (collectively, “Oracle”) move to exclude untimely expert opinions offered by Defendants Rimini  
 3 Street’s and Seth Ravin’s (together, “Rimini’s”) damages expert, Scott D. Hampton.  
 4 Specifically, Oracle moves to exclude paragraphs 8 and 9, table 1 and schedules M1.SU, M2.SU,  
 5 M3.1.SU, M3.2.SU and M3.3.SU from Mr. Hampton’s September 2, 2015 supplemental expert  
 6 report, as well as any testimony or argument concerning those new opinions.

7 Mr. Hampton is likely to be called as a witness by Wednesday, September 30.

# 8 I. INTRODUCTION

9 Two weeks before trial, Rimini’s damages expert, Scott Hampton, disclosed brand new  
 10 opinions concerning customers that left Oracle from 2006-2011. [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 There are some obvious methodological and logical problems with Mr. Hampton’s new  
 19 opinions. However, for purposes of this motion, the relevant point is that every input into Mr.  
 20 Hampton’s analysis was available to him well before his 2012 expert report was due, and there is  
 21 no reason why he could not have completed this analysis three years ago. The late disclosure  
 22 requires that the Court exclude these new expert opinions.

23 In addition, Mr. Hampton’s new opinions are based on the assumption that  
 24 TomorrowNow and CedarCrestone were available as non-infringing alternatives that Rimini’s  
 25 customers could have gone to instead of remaining with Oracle for support. These opinions  
 26 directly contradict Rimini’s statements to the Court on the record that it will not offer either  
 27 company as a non-infringing alternative. The Court should exclude Mr. Hampton’s new  
 28 opinions for this reason as well.

## 1 II. BACKGROUND

### 2 A. The Parties' 2012 Damages Reports

3 On January 17, 2012, Oracle disclosed the expert opinion of its damages expert,  
4 Elizabeth Dean. Declaration of Thomas S. Hixson ("Hixson Decl."), Ex. A (2012 Dean report).  
5 On March 30, 2012, Rimini disclosed the rebuttal report of its damages expert, Mr. Hampton.  
6 *Id.* Ex. B (2012 Hampton report). Both experts addressed Oracle's damages claims for the  
7 customers gained from 2006 through September 2011, and calculated damages for them through  
8 the then-anticipated date of trial, in 2012.

9 As part of her lost profits opinions, Ms. Dean reduced her calculation of Oracle's lost  
10 support revenues by applying Oracle's historical revenue attrition rates. *Id.* Ex. A (2012 Dean  
11 Report) ¶¶ 91-93, Tbls. 6, 7. She used Oracle's actual renewal revenue data for the PeopleSoft,  
12 J.D. Edwards, and Siebel products. *Id.* Ex. E (Trial Tr.) at 1803:1-1805:18 (Dean testimony).  
13 The underlying data was produced to Rimini in 2011 during discovery. Hixson Decl. ¶ 7.

14 In 2012, Mr. Hampton took a different approach to the relevancy of Oracle attrition rates.  
15 He criticized Ms. Dean for including "customers who never left Oracle support in the population  
16 of her attrition rate calculation." *Id.* Ex. B (2012 Hampton Report) ¶ 104. He opined that the  
17 "proper population and associated rate should only include customers who actually left Oracle.  
18 The percentage of Oracle's 'available to renew' revenue dollars *says nothing about the*  
19 *percentage of Oracle's 'lost customers' who Oracle would be able to retain but for Rimini*  
20 *Street's alleged wrongful acts.*" *Id.* ¶ 105 (emphasis added).

### 21 B. Rimini's 2015 Attempt To Prevent Updated Damages Analysis

22 In 2015, Rimini filed a Motion to Preclude Certain Damages Evidence Pursuant to  
23 Federal Rules of Civil Procedure 26(E) and 37(C). Dkt. 554. Rimini argued that Oracle should  
24 not be permitted to extend its damages calculations from 2012 through February 2014 for all 364  
25 customers Rimini disclosed during discovery. Rimini argued that "any damages claims that  
26 extend beyond the damages theories set forth in Oracle's expert damage report should be  
27 excluded at trial in *Rimini I.*" Dkt. 554 at 11:6-8. Rimini further argued that Oracle could not  
28 "remedy its failure to supplement by amending its expert disclosures now because the prejudice

1 to Rimini from any eleventh-hour amendment is readily apparent. Trial is scheduled to begin  
 2 within five months, and allowing Oracle to amend its damages report to include additional  
 3 damages arising before February 13, 2014, will significantly expand Oracle's damages claim."  
 4 Dkt. 554 at 10:16-20.

5 The Court denied Rimini's motion, finding that Oracle was entitled to supplement its  
 6 2012 damages report to account for the passage of time. Dkt. 669 at 4. The Court set a deadline  
 7 for that disclosure, provided Rimini with the opportunity to depose Oracle's expert, and allowed  
 8 Rimini to "prepare and serve any supplement to their own expert report *on the issue of the*  
 9 *supplemental damages.*" Dkt. 669 at 5:1-5 (emphasis supplied).

#### 10 C. 2015 Supplemental Expert Reports

11 On July 30, 2015, Oracle served Dean's supplemental expert report. Hixson Decl. Ex. C  
 12 (2015 supplemental Dean report). As allowed by the Court's order, Ms. Dean extended her lost  
 13 profits calculations through February 2014. As part of her update, she "[u]pdated the attrition  
 14 rates and profit margins used in [her] calculations of Oracle's lost profits . . . to reflect Oracle's  
 15 historical results." *Id.* Ex. C ¶ 1. She used the exact same methodology as in her 2012 report.

16 On September 3, 2015, Rimini served a supplemental expert report from Mr. Hampton.  
 17 Hixson Decl. Ex. D (2015 supplemental Hampton report). In that report, Mr. Hampton did an  
 18 about face and determined that Oracle's renewal rate data *is relevant* to damages in this case.  
 19 His supplement included brand new opinions that Hampton now claims are relevant to lost  
 20 profits. *Id.* Ex. D ¶¶ 8-9, Table 1, & Exhibits M1.SU through M3.3.SU.

21 In his new opinions, [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED], *Id.* Table 1. [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

1 [REDACTED]. *Id.* n.7. To determine the median, he used the  
 2 support fees Rimini's customers used to pay Oracle, as determined by Ms. Dean *in her 2012*  
 3 report. *Id.* Exhibit M3.1.SU (sourcing his analysis to Dean Schedule 16, which was disclosed in  
 4 2012). The analysis is comprised of 11 pages of new calculations. Every input for his 2006-  
 5 2011 analysis was available to him *in 2012*. Mr. Hampton then used this analysis to conclude  
 6 that "Rimini Street was not the cause of Oracle's attrition or lost profit" because, according to  
 7 him, so many customers left Oracle in those years anyway. *Id.* ¶ 9.

### 8 **III. MR. HAMPTON'S NEW OPINIONS SHOULD BE EXCLUDED.**

#### 9 **A. Mr. Hampton's New Opinions Are Untimely And Not** 10 **Permitted Under The Court's Order Regarding** 11 **Supplementation.**

12 Mr. Hampton's new renewal rate opinions should be excluded because they were not  
 13 disclosed by the expert disclosure deadline. Expert disclosures shall be made "at the times and  
 14 in the sequence that the court orders." Fed. R. Civ. P. 26(a)(2)(D). Here, the deadline to  
 15 complete expert discovery was May 18, 2012. Dkt 232. A party who fails to disclose an expert  
 16 opinion by the deadline is subject to sanctions and exclusion pursuant to Rule 37(c). Under Rule  
 17 37(c), "If a party fails to provide information or identify a witness as required by Rule 26(a) or  
 18 (e), the party is not allowed to use that information or witness to supply evidence on a motion, at  
 19 a hearing, or at trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P.  
 20 37(c).

21 Rimini's failure to disclose Mr. Hampton's new analysis is not substantially justified or  
 22 harmless. Every input to his analysis was available to him before he disclosed his *2012* report.  
 23 Moreover, his entire analysis is designed to support his opinion for the 2006-2011 period, when  
 24 all of the relevant customers signed with Rimini. Hixson Decl. Ex. D (2015 Hampton  
 25 Supplement, Table 1). There was no justification for waiting until two weeks before trial to  
 26 disclose these new opinions.

27 Mr. Hampton's analysis must also be excluded because it ignores the Court's order  
 28 limiting the scope of the supplemental reports to "the issue of the supplemental damages." Dkt.  
 669 at 5:1-5. Mr. Hampton's new analysis does not respond to the new material in Ms. Dean's

1 2015 supplemental report, but rather regresses to a discussion of material included initially in her  
 2 2012 report. Tellingly, Mr. Hampton's new analysis relates to the time period 2006-2011 while  
 3 Dean's supplement extends calculations from 2012-2014.

4 Oracle has been prejudiced by Mr. Hampton's late disclosure just two weeks before trial.  
 5 Oracle did not have the opportunity to depose Mr. Hampton on his dubious new opinions. Thus,  
 6 Oracle has had no opportunity to examine the reliability of the analysis (every indication is that it  
 7 is *not reliable*). For example, Oracle does not know why Mr. Hampton used the methodology he  
 8 chose, including why he [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED], as well as other

13 matters. These are not questions that Oracle should be forced to ask Mr. Hampton for the first  
 14 time while on the stand at trial. With no opportunity to develop a record to challenge the  
 15 admissibility of these new opinions on the merits, Oracle is severely prejudiced, and Mr.  
 16 Hampton's analysis should be excluded.

17 **B. Hampton's New Opinions Are Contrary To Rimini's**  
 18 **Assurances To The Court Regarding TomorrowNow And**  
**CedarCrestone.**

19 Mr. Hampton's late disclosed opinions are directly contrary to Rimini's promise to the  
 20 Court that Rimini will not argue that TomorrowNow or CedarCrestone were available, non-  
 21 infringing alternatives to Oracle support. Rimini told the Court: "We have no intention  
 22 whatsoever of referencing TomorrowNow or CedarCrestone as noninfringing alternatives.  
 23 That's not going to happen." Hixson Decl, Ex. E (Trial Tr.) at 1615:22-24; *see also id* at  
 24 1606:12-15 (Rimini Counsel: "I said that we didn't intend to argue that TomorrowNow was a  
 25 noninfringing alternative"); Dkt. 816 at 2 ("Rimini will not introduce evidence that  
 26 TomorrowNow and CedarCrestone were infringing or non-infringing alternatives.").

27 In his new opinions, Mr. Hampton states that "[REDACTED]"

28 [REDACTED]

1 [REDACTED]

2 [REDACTED]” Hixson Decl. Ex. D (2015 supplemental Hampton report) ¶ 9 (emphasis supplied).

3 Rimini and Hampton argue that because so many customers purportedly left Oracle each year for

4 options that were not Rimini, the customers who did leave for Rimini would have left Oracle

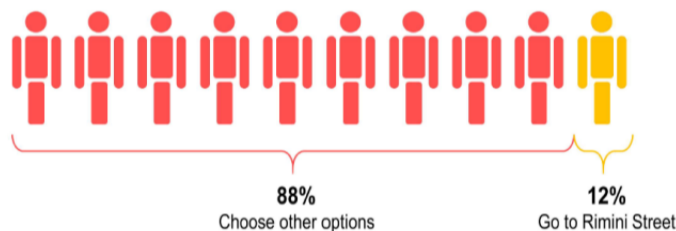
5 regardless of Rimini’s infringement. For example, during Rimini’s opening argument, Rimini

6 displayed the following demonstrative and argued to the jury that:

7

8 **Most Customers Leaving Oracle Choose Other Options**

9 **Of those customers leaving Oracle:**



17 Five percent of their customers leave every year. It's called churn.

18 Every year five percent of these customers leave for one of these

19 options. Only about 12 percent end up going with Rimini. You'll

20 have to ask the question to yourselves in this case, where are the

21 others going? How can Oracle prove that Rimini Street would

22 have gone back to Oracle rather than to deal with what these 88

23 percent of these other folks did?

24 Hixson Decl. Ex. E (Trial Tr.) at 128:15-23 (Rimini opening).

25 Counsel’s argument was based on Mr. Hampton’s analysis, and both are flawed because

26 the “88%” who “[c]hoose other options” *include customers who left Oracle for TomorrowNow*

27 *and CedarCrestone*. TomorrowNow alone had 358 customers on the PeopleSoft, J.D. Edwards,

28 and Siebel product lines – almost as many as Rimini. *Oracle USA, Inc. vs. SAP AG*, No. 07-CV-01658, (N.D. Cal.), Dkt. 1141, Undisputed Fact 68. No adjustment has been made to Mr.

Hampton's analysis for these customers. Thus, Mr. Hampton's new opinions contending that a large percentage of customers leave Oracle every year for options that are not Rimini – and including in that denominator *all* cancellations where the customer did not go to Rimini – necessarily includes Oracle's losses to TomorrowNow and CedarCrestone, implicitly using them as available non-infringing alternatives. This is exactly the argument that Rimini told the Court it would not make. The Court should hold Rimini to its promise and exclude Mr. Hampton's new opinions that implicitly assume the availability of TomorrowNow and CedarCrestone as non-infringing alternatives.

#### IV. CONCLUSION

For the foregoing reasons, the Court should exclude Mr. Hampton's new opinions.

Dated: September 27, 2015

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